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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES D. ARNOLD, JR., Petitioner

v.

BURGER KING CORPORATION, and FICKLING ENTERPRISES

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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78 pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner, a black male, was discharged from his position as an assistant manager of a Burger King restaurant in Fayetteville, North Carolina, and filed an employment discrimination suit against his employers. The Courts below assessed attorneys' fees against the petitioner (in favor of the employers) on the theory that his suit was "frivolous, unreasonable, and without foundation". The questions presented for review are as follows.

1. Does Christiansburg Garment Co. v. EEOC permit a federal court to conclude that an employment discrimination suit is "frivolous, unreasonable, or without foundation" without first giving consideration to such objective criteria as the following: (i) after full hearing on the merits the EEOC issued a "right to sue" letter to the discharged employee; (ii) the discharged employee was

represented successively by two experienced trial counsel; (iii) after extensive pre-trial discovery the employer did not move for summary judgment but instead entered into settlement discussions; (iv) the discharged employee introduced evidence of disparate treatment based on race; (v) the discharged employee introduced evidence of a racial statistical imbalance amongst managerial employees; (vi) the purported reason for the discharge (sexual harassment of subordinate employees) was vigorously denied by the plaintiff, and by some of those identified by the employer as "victims"; (vii) at the close of the employee's case in chief the trial judge denied the employer's motion to dismiss; and (viii) the employee manifested throughout the enitre proceedings an earnest belief that he was the victim of racial discrimination.

2. As a matter of law, may a federal court in an employment discrimination suit assess attorney's fees against an unsuccessful employee if there is "some basis" for a claim of discrimination? Put conversely, must the claim be entirely void of arguable legal merit or factual support to justify the imposition of attorney's fees on the losing employee.

3. May a federal court in an employment discrimination suit assess and ascertain attorney's fees solely on the basis of the normal and reasonable "hours and rates" of the employer's counsel; or must the federal court also consider such factors as the financial status of the losing employee.

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The petitioner James D. Arnold, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October, 1983.

OPINION BELOW

The opinion of the court of Appeals is reported at 719 F. 2d 63. It is appended hereto at p. 1-A.

JURISDICTION

The judgement of the Court of Appeals for the fourth Circuit was entered on October 5, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 28, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC sec. 1254(1),

STATUTORY PROVISIONS INVOLVED

Section 706(K) of Title VII of the Civil Rights Act of 1964, 42 USC sec. 2000e-5(k) provides as follows:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the

United States shall be liable for costs the same as a private person."

STATEMENT OF THE CASE

This petition concerns the award of attorneys' fees to respondents Burger King Corporation and Fickling Enterprises in a suit filed by petitioner Arnold under Title VII of the Civil Rights Act of 1964. The first issue concerns the standards to be applied in determining whether an employment discrimination suit is "frivolous, unreasonable, or without foundation" under Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). The second issue concerns the standards to be applied in determining the amount of fees to be awarded to attorneys once it is determined that the suit is "frivolous, unreasonable, or without foundation."

Petitioner Arnold retired from the Army in 1976 and began work at the three Burger King restaurants in Fayetteville, North Carolina, franchised to Fickling

Enterprises. He learned the business "from the bottom", and in due time became the manager of the restaurant on Bragg Boulevard.

Mr. Fickling liked "to have a ratio of about fifty-fifty, at least fifty-fifty" black and white employment (R. Vol. X, p. 42). But at the managerial level, there were "some fifty odd managers and assistant managers" of whom only four were black (R. Vol. X, p. 36). Three of the blacks were women; one, Mr. Arnold, was male.

After George Ulrich replaced Lester Hope as general manager of the three restaurants, Arnold was demoted to be an assistant manager at the Raeford Road Restaurant. On July 3, 1979 Petitioner Arnold was discharged from this position. Mr. Fickling subsequently testified that George Ulrich, his general manager, had called to tell him that there were "a

number of complaints at the Raeford Road (restaurant) about Mr. Arnold and that some of the employees would not work at night on the nights that he worked". (R. Vol. III, p. 128) Illustrative was the specific report from general manager Ulrich that Lisa Messemer reported to Ulrich that "she had been working fries and that he (Arnold) had rubbed up against her . . . seems like he would get around her and like put his arm around and rub himself up against her when she was working the fry position". (R. Vol X, p.62)

Without consulting Arnold, without consulting the manager of the Raeford Road restaurant, without consulting Lisa Messmer or any of the other alleged "victims", Mr. Fickling told his manager Ulrich: "I want you to terminate Mr. Arnold immediately". (R. vol. III, p. 128).

Mr. Ulrich then told Arnold that

three girls complained to Mr. Fickling that Arnold had been putting his hands on them and that he, Arnold, was fired. (R. Vol III, p. 15) Arnold called Mr. Fickling to protest his innocence, but Fickling replied that the deciison to discharge was final. (R. Vol III, p. 15)

In contrast, when at an earlier date there had been complaints from some women employees that Pete Adcock, a manager, "was feeling on them or harassing them or saying suggestive things to them"; Mr. Fickling directed general manager Ulrich to "conduct an investigation", to "see if you can find out what is going on and call me back". Pete Adcock "was Caucasion". (R. Vol X, pp. 77-78).

Arnold filed a charge with the Equal Employment Opportunities Commission alleging that the accusations of sexual harassment were false, and that he had been fired because of his race. The EEOC

conducted an investigation, and interviewed the five "victims" identified by Mr. Fickling. They were Lisa Messemer, Afton Anderson, Marsha Myers, Edith Melton Daniels, and Andrea Pressley. Thereafter, the EEOC sent Arnold a "right to sue" letter.

Arnold retained an experienced trial counsel, who filed suit in the federal court for the eastern district of North Carolina. Extensive depositions were taken of all the parties, and all of the alleged "victims". Thereafter a "pre-trial conference" was conducted by a conference call, and "Counsel advised the Court that there are definite settlement possibilities".

Settlement was not reached, and the case was called for trial. By that time petitioner Arnold had dismissed his first attorney, and retained a second experienced trial counsel.

Testimony at trial tracked the testimony at the earlier pre trial stages.

Lisa Messemer, an alleged "victim", denied that she had reported to Mr. Ulrich that Arnold had mollested her. To the contrary, she said that Mr. Arnold had never "placed his hands" on her body or "made sexual advances toward her". She said he was "a very pleasant person to work with". (R. Vol. III, pp. 51-52).

Afton Anderson, a second alleged "victim", testified that at no time had she had any problems, "any kind of hanky panky", with Mr. Arnold; and that she had never told any one that she had any problems with Mr. Arnold; although general manager George Ulrich had asked her about this. (R. Vol. III, pp 4-5).

Marsha Myers, a third "victim" testified that on one occasion, at the end of the day, she was counting her money

with Mr. Arnold and he touched her breast with the eraser end of a pencil. That was it. (R. Vol. III, p. 97). Edith Melton Daniels, a fourth "victim" testified that on one occasion when she was bending over "fixing some tomatoes in a pan", Mr. Arnold came behind her and "I got pinched". That happened "once", (R. Vol. X, pp. 506).

The fifth and last alleged "victim", Andrea Pressley, testified that on one occasion, in September or October of 1978, Mr. Arnold approached her at closing time and tried to kiss her, tried to force himself upon her, and her uniform ripped as she fought him off. (R. Vol V, pp. 6-9). She didn't hold this against Mr. Arnold, and sent him a Christmans Card, and his wife a Christmans Candle. (R. Vol. III, p. 109). But in March, of 1979, when she worked for Mr. Arnold at the Raeford street Burger King, and he started

giving her a hard time about her inaccurate record keeping, she reported the earlier incident to Mrs. Connie Locker (the manager) and to Mrs. Nancy Abendschein, the assistant manager. Mrs. Locker testified that "I wasn't impressed . . . she (Andrea Pressley) had too many complaints about her family life and . . . people working with her just didn't want to hear that". (R. Volv. VIII, pp. 607). Mrs. Nancy Abendschein, the assistant manager similarly testified that Andrea Pressley had told her of the incident, but "I just didn't pay any attention" to it. (R. Vol. XI, pp. 47 4-7).

Mr. Arnold spent much of his trial time proving that the purported reason for his discharge was pretextual, a "not unreasonable way in which to proceed to establish a case of discrimination". Jones v. Western Geophysical Co., 669 F. 2d 280, 284 (5th Cir. 1982).

He denied that he had touched Marsha Myers with the eraser end of his pencil. He denied that he had pinched Edith Daniels. He denied that he had molested Andrea Pressley in any way. (R. Vol. III, pp. 26-27).

He put on three women employees who had worked with him at night, including the sister of alleged "victim" Edith Melton Daniels. They testified that his reputation was "fine, very nice, always courteous"; that they knew of no employees who were "afraid to work with Mr. Arnold"; and that they had never heard about him "having a reputation of touching ladies". (R. Vol. III at pages 55, 61, 65).

Mr. Arnold insisted throughout that:

> "It was mainly a frame-up with those women. That is one of the oldest tricks in the book. It has been used for about three hundred years on us". Vol. R. Vol. VI, p. 38.)

He insisted that General Manager George Ulrich was behind it all; that Mr. Ulrich "had asked these women to make up these lies about it" (R. Vol. IIi, p. 38), that he had had problems with Mr. Ulrich in the past about the way he managed the Bragg Boulevard restaurant; (R. Vol. III, p. 35-37); that Mr. Ulrich had inspected his restaurant with a vigor noticably lacking when he inspected the restaurants managed by whites; (R. Vol. III, p. 41); and that a reliable third party had reported that Ulrich had said about him: "That boy has got too big for his britches and I got to let him down a little bit". (R. Vo. VI, P. 38).

The trial judge denied the motion to dismiss made at the close of Arnold's case in chief, but at the close of the trial he ruled against Arnold in an opinion "dictated from the bench," after a brief recess.

He began with the statement, out of the blue and completely without any evidentiary support, that:

> "The Court is firmly convinced that the plaintiff himself knew from the very beginning that this case was meritless and groundless and it was brought before us. And I believe I know the reason he did it. I believe it is tied in with the actions of his lovely wife back there.
>
> "In as much as she disbelieved what could have happened about what had been said, it is my feeling that he pursued this course of action to prove to her that it didn't". (R. Vol. 2 of the trial proceedings, p. 24).

Thereafter, the Court concluded that the termination was for "a legitimate business purpose", and "not in any way racially motivated". (R. Vol. II of the trial proceedings, p. 26).

The Court then ordered that "plaintiff pay defendant reasonable attorney fees". (Appendix to this petition, p. B-1). To this end the Court directed counsel for the defendant:

"to file within one week from

> date of Judgment an affidavit showing time and expenses incurred in defense of this action". (Appendix to this Petition, p. B-1).

Counsel for defendant Fickling thereupon filed an "application for award of attorney's fees", showing 110.6 hours of service at $65.00 per hour, a total of $7,189.00. (Appendix to this petition, p. B-4).

Counsel for defendant Burger King filed an "application for attorney's fees", and likewise showed the hours of service, and the normal hourly rate charged by the firm; a total here of $3,555.00. (Appendix B to this petition, p. B-8).

The trial judge awarded these requested fees without alteration, solely on the basis of the "time and costs involved", without consideration of any other factor. (Appendix to this petition, pp. B-7, B-12).

The Court of Appeals for the Fourth Circuit affirmed the trial court on both issues.

Concerning the standards to ascertain whether a suit is "frivolous, unreasonable or without foundation", the Court below noted that the Christiansburg court "made no attempt to quantify the evidence an unsuccessful plaintiff must produce to avoid an award of attorneys' fees to the defendant"; (Appendix to this petition, p. A-7); that "in reacting to Christiansburg, the courts have established no consistent pattern in declaring a claim frivolous" (Appendix to this petition, pp. A-10--A-11); and that the "one common strand running through all these cases is that assessment of frivolousness and attorneys' fees are best left to the sound discretion of the trial court after a thorough evaluation of the record and appropriate factfinding". (Appendix to

this petition, pp. A-12--A-13). The Court below then briefly reviewed a few highlights of the trial evidence, and concluded that "the trial court's finding of frivolousness was fully justified". (Appendix to this petition, p. A-14).

Concerning the standards for determining the amount of the fee to be awarded, the Court below correctly noted that

> "In appropriate circumstances, the district court should give weight to the relative financial positions of the litigants". (Appendix to this petition, p. A-19)

because

> "The policy of deterring frivolous suits is not served by forcing the misguided Title VII plaintiff into financial ruin simply because he prosecuted a groundless case". (Appendix to this petition, p. A-20)

The Court of Appeals then noted that the trial court in the instant case "arrived at the amount it awarded by multiplying the number of hours spent on each party's

defense by a reasonable hourly attorney's fee", (Appendix to this petition, p. A-22). The Court approved of this method of calculation, because

> "The trial court found that Arnold was gainfully employed and apparently able to pay the fee award on such reasonable terms as might be arranged, and that the fee award was the reasonable value of the attorneys' services. It was required to do no more". (Appendix to this petition, p. A-23)

Petitioner Arnold filed a timely petition for reconsideration with the suggestion that the case be reheard en banc.

Concerning the standards applicable in determining whether a suit is "frivolous, unreasonable, or without foundation", Arnold suggested that the Court omitted any discussion of considerations deemed critical by other courts: the honest belief of Arnold that race was at the bottom of his discharge; his receipt of a "right to sue" letter

from the EEOC; the fact that he could retain not only one, but two experienced trial attorneys; the fact that defendant entered into settlement conversations as trial approached; the fact that the trial judge denied defense motions to dismiss at the close of Arnold's evidence; and the statistical evidence showing a marked racial imbalance in the managerial work force.

Concerning the standards to be applied in measuring the amount of a fee, Arnold pointed out that the Court was mistaken in its belief that the "trial court found that Arnold was gainfully employed and apparently able to pay the fee award on such terms as might be arranged".

All counsel agreed that the district court made no findings in this regard. The trial court did not find that Arnold could pay the fee award. The trial court

made no effort to arrange reasonable terms of payment. The evidence for such findings were not available to the trial court.

The first time Arnold's financial status was mentioned in any of the proceedings came long after trial was over; when Arnold filed with the Court of Appeals a motion for leave to file only ten copies of the brief in typewritten form. Attached to this motion was an affidavit describing his limited income (primarily from military retirement pay) offset by deep family obligations (including two handicapped children, and a third child still in school).

Arnold moved the Court of Appeals to grant rehearing and rectify the misunderstanding of record concerning what had happened below. The motion was denied, with the consequence that Arnold is under a mandate to pay the full amount

of the defendants' counsel fees, measured solely by the hours spent on the case multiplied by the customary fee charged by the attorneys for the two respondents. No consideration was given at any time to the probability that this might force Arnold into financial ruin.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is In Conflict with The Holdings Of Other Courts Of Appeals And Demonstrates The Need For Guidelines When Federal Courts Must Determine Whether Or Not An Employment Discrimination Case Is "Frivolous, Unreasonable, or Without Foundaiton".

This Court first determined the standards for awarding attorney's fees to a defendant who prevails in an employment discrimination case in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). The Court there rejected the contention of the Commission that attorneys' fees should never be granted unless the plaintiff was motivated by "bad faith". This standard would be redundent as all apart from statute attorney's fees traditionally are awarded against a party who proceeds in bad faith.

The Court further rejected the

contention of Christiansburg that the prevailing defendant should be awarded fees in all cases free from special circumstances, as is the rule in awarding fees to the prevailing plaintiff. The Court recited two reasons for distinguishing the prevailing plaintiff from the prevailing defendant: "the plaintiff is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority; and when a district court awards counsel fees to a prevailing plaintiff it is awarding them against a violator of federal law".

The Court in Christiansburg adopted a middle ground: attorney's fees would be awarded to a prevailing defendant when the plaintiff's action is "frivolous, unreasonable, or without foundation". 412 U.S. at 421. The Court cautioned that in applying these criteria:

> "It is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." 412 U.S. at 421-422.

This kind of "hindsight logic", warned the Court, would discourage all but the "most airtight claims". 412 U.S. at 422.

Subsequently, in Hughes v. Rowe, 449 U.S. 5 (1980) this Court applied the standards of Christiansburg to the award of attorneys' fees in a suit under 42 U.S.C. sec. 1983. The Court reversed the award of attorneys' fees in that case and explained that:

> "the allegations of petitioner's amended complaint are definitely not meritless in the Christiansburg sense. Even those allegations that were properly dismissed for failure to state a claim deserved and received the careful consideration of both the District Court and the Court of Appeals. Allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone 'groundless' or 'without foundation'

as required by Christiansburg". 449 U.S. at 16-17.

The Fourth Circuit here found these guidelines inadequate. It noted that Christiansburg "made no attempt to quantify the evidence an unsuccessful plaintiff must produce to avoid an award of attorneys' fees to the defendant"; (Appendix to Petition, P. A-7); and that "in reacting to Christiansburg" the courts "have established no consistent pattern in declaring a claim frivolous". (appendix to petition, p. A-11). The Court below could find no "common strand running through the cases" other than that the assessment of attorneys' fees is "best left to the sound discretion of the trial court after a thorough evaluation of the record". (Appendix to petition, p. A-13).

Other Courts differ completely with the Fourth Circuit in the way they interpret Christiansburg and Hughes.

In the Fifth Circuit, attorneys' fees are not assessed unless the plaintiff's case is "devoid of arguable merit". Plemer v. Parsons-Gilbane, 713 F. 2d 1127 (5th Cir. 1983); Jones v. Texas Tech University, 656 F. 2d 1137 (5th Cir. 1981).

In the Eighth Circuit, to justify the award of fees the suit must "not only be weak, but meritless", and no fees will be authorized if there is "some basis for the claim of discrimination". Obin v. Dist. No. 9 if the Intern. Ass'n Etc., 651 F. 2d 574 (8th Cir. 1981); Bowers v. Kraft Foods Corp., 606 F. 2d 816 (8th Cir. 1979); Mosby v. Webster College, 563 F. 2d 901 (8th Cir. 1977).

In the Ninth Circuit, the prevailing defendant will not be awarded attorney's fees even when the plaintiff's suit "borders on the frivolous", as long as it is "not entirely frivolous". Shah v. Mt.

Zion Hospital & Medical Ctr., 642 F. 2d 268 (9th Cir. 1981).

In the Tenth Circuit, the plaintiff will not be penalized with attorney's fees unless the court is persuaded that the record is "devoid of any evidence of discrimination". That would not be so if there is "some evidence of disparate treatment". Montgomery v. Yellow Freight System, 671 F. 2d 412 (10 Cir. 1982).

But the Fourth Circuit, and others, have failed or refused to verbalize a formula to assist in the decision of what cases are or may be "frivolous".

Further, unlike the Fourth Circuit, other courts rely upon objective criteria in assessing the presence of "frivolousness". These objective criteria include: a reasonable belief that the claim has merit based upon receipt of an EEOC right-to-sue letter, Bowers v. Kraft Foods Corp., 606 F. 2d 816 (8th Cir.

1979); belief by plaintiff that she was the victim of racial discrimination brought about by disparate treatment, Mosby v. Webster College, 563 F. 2d 901 (8th Cir. 1977); a reasonable belief that the foreman harbored a hostility that ultimately culminated in discharge, Obin v. Dist. No. 19 of Int. Ass'n Etc., 651 F. 2d 574 (8th cir. 1981); evidence of disparate treatment, Montgomery v. Yellow Freight System, Inc., 671 F. 2d 412 (10th Cir. 1982); proof of a racial imbalance in the foremen ranks, Equal Employment Opportunities Commission v. Fruehauf Corp., 609 F. 2d 434 (10th Cir. 1979), an ability to retain experienced trial attorneys, Little v. Southern Elec. Steel Co., 595 F. 2d 998 (5th Cir. 1979); and the failure by the defendant to file a pretrial motion for summary judgment because of factual issues in dispute. Nulf v. Int. Paper Co., 656 F. 2d 553

(10th Cir. 1981).

The Fourth Circuit in the instant case refused to announce a standard of general applicability; it declined to utilize a series of criteria based on objective considerations. Each case, it seems, must rest on its own individual bottom. The consequence is that no potential plaintiff can be sure that his employment discrimination suit will not be branded as "frivolous, unreasonable, or without foundation". The threat of crushing attorney's fees hangs like the sword of Damocles, and paralizes enforcement of the nation's policy that considerations of race, sex, age, religion, and national origin be eliminated from employment choices and opportunities. Certiorari, here, seems appropriate.

II.

The Decision Below Conflicts With Decisions In Other Circuits, and Demonstrates The Need For Guidelines In Measuring The Amount of The Attorney's Fees To Be Awarded Under Christiansburg.

Despite language to the contrary, the Court below in the instant case affirmed that an award of attorneys' fees based solely upon a formula of multiplying the number of hours spent on the case by the law firm's regular hourly fee. All of this without consideration of other factors such as the relative ability of the parties to bear the loss.

This decision is in conflict with the decisions of the other circuits.

The Second Circuit has held that:

> "to acknowledge that a party is eligible for attorney's fees only begins the inquiry, for the Court must then ascertain the proper amount . . . Because fee awards are at bottom an equitable matter, courts should not hestitate to take the relative wealth of the parties into

account". Faraci v. Hickey-Freeman Co., Inc. 607 F. 2d 1025, at 1028 (2d Cir. 1979).

The Fifth Circuit has held that:

> "While the determination of reasonable attorney's fees is left to the sound discretion of the court, the court must articulate reasons for its award in order that we may have a basis to review that award . . . A computation of reasonable fees solely on the basis of hour-times-dollars formula does not satisfy the court's responsibility". Anthony v. Marion County General Hospital, 617 F. 2d 1164 at 1171 (5th Cir. 1980).

The Ninth Circuit is in agreement that:

> "The strong policy considerations favoring an award of costs and attorney's fees to a victorious plaintiff in a Title VII action do not apply in favor of a victorious defendant. Other factors to be considered include the good faith of the plaintiff in bringing the action or appeal, and the ability of the prevailing defendant 'to pay its own way'". Silver v. KCA, Inc., 586 F. 2d 138 at 143 (9th Cir. 1978).

The Eleventh Circuit also holds that:

> "A district court awarding attorney's fees to a prevailing Title VII defendant should consider not only the applicable Johnson guidelines, but also, as a limiting factor, the plaintiff's financial resources". Durrett v. Jenkins Brickyard, Inc., 678 F. 2d 911, 917 (11th Cir. 1982).

A number of similar decisions are collected and discussed in Hill v. BASF Wyandotte Corp., 547 F. Supp. 348 (E.D. Mich. 1982). There, the defendant sought an award of $97,490.55 in attorney fees, "reduced so as not to exact 'vengence' from its actual expenses of $167,590.55". Noting that the defendant was a large corporation "in a better position than plaintiff to absorb the costs of this litigation", the Court concluded that:

> "An award of attorney fees in the amount of $3,000 would accomplish the deterrent purpose of the statute, afford defendant some compensation for services required in defense of this action, yet not financially cripple plaintiff". 547 F. Supp. at

356.

In Hensley v. Eckerhart, ___U.S.___, 103 S. Ct. 1933 (decided May 16, 1983), this Court granted certiorari to determine whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims. In Blum v. Stenson, ___U.S.___, 104 S. Ct. 1541 (decided March 21, 1984), this Court granted certiorari to determine two related issues: whether Congress intended fee awards to nonprofit legal service organizations to be calculated according to cost or to prevailing market rates; and whether, and under what circumstances, an upward adjustment of an award based on prevailing market rates is appropriate under sec. 1988. Petitioner suggests that the time has now come to grant certiorari in the instant case, to determine the appropriate standards in measuring attorney fees awarded to prevailing

defendants in employment discrimination suits. If left unreviewed, the decision below will surely "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII". Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422. (1978).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1697

James D. Arnold, Jr.,

Appellant,

v.

Burger King Corporation and
Fickling Enterprises,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. W. Earl Britt, District Judge.

Argued: July 13, 1983

Decided: October 5, 1983

Before PHILLIPS, SPROUSE and ERVIN, Circuit Judges.

Daniel H. Pollitt, University of North Carolina School of Law for Appellant; Thornton H. Brooks (William P. H. Cary on brief) and G. Jona Poe, Jr. (Terry D. Fisher; Stubbs, Cole, Breedlove, Prentis & Poe; Brooks, Pierce, McLendon, Humphrey & Leonard on brief) for Appellees.

SPROUSE, Circuit Judge:

James D. Arnold, Jr., appeals from the district court judgment awarding Fickling Enterprises and Burger King Corp. attorneys' fees for their successful defense against his race discrimination suit.[1] Arnold argues on appeal that the trial court abused its discretion in awarding attorneys' fees to the prevailing defendants and, alternatively, that because the award amounts, $7,189 to Fickling[2] and $3,555 to Burger King, were not reduced in light of his ability to pay, they were excessive. We disagree

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[1]The appellant initially sought reversal of the trial court's decision on the underlying claim of race discrimination, but has abandoned that position and focused on the attorney's fees question.

[2]Fickling was awarded an additional $642.80 to recover the costs of depositions and witness fees. This portion of the fee award has not been challenged.

with both arguments and affirm the district court's judgment.

James Arnold, a black male, was employed by Fickling Enterprises, owner and operator of three Burger King restaurants in Fayetteville, North Carolina. He had been employed as an assistant restaurant manager by the previous owner from 1976 through November 1977, when Fickling purchased the small chain. He subsequently was promoted by Fickling to restaurant manager and served in this capacity for nine months, at which time he was relieved because of his failure to keep proper inventory records. He was then reassigned to the position of training manager at Fickling's Raeford Road restaurant without a reduction in salary.

Shortly after the reassignment, several female employees registered a series of formal complaints with

management alleging acts of sexual harassment by Arnold. The complaints accused Arnold of various incidents of misconduct, including proposals to engage in sex and acts of deliberate and suggestive physical contact with female co-workers. In one instance, Arnold was accused of cornering a female employee in the manager's office after hours and forcing his attentions on her; the resulting scuffle led to her blouse being torn in several places. The alleged incident occurred before Arnold's reassignment, but was not reported until after he assumed the position of training manager.

Following the receipt of these complaints, Arnold was discharged. He subsequently filed a race discrimination charge with the EEOC, alleging that Fickling Enterprises and its franchisor, Burger King Corp., had violated Title VII

of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1976). The EEOC issued Arnold a right-to-sue letter and he instituted the present suit in the United States District Court for the Eastern District of North Carolina, naming Fickling and Burger King as co-defendants. In the early stages of the litigation, the trial court found that Burger King had not participated in the discharge decision and dismissed the action against it. In the trial against Fickling, Arnold's only evidence was his testimony and the testimony of sevral co-workers and friends attesting to his good character. After the defendant's evidence, the trial court ruled that Arnold's claim of race discrimination was frivolous and groundless from the outset and dismissed the case against Fickling. The district court ordered Arnold to pay the prevailing defendant's attorney's fees, and asked

both defendants to prepare an affidavit verifying the time and expenses incurred in defending against the frivolous claim. It subsequently considered and approved fees in the amount of $7,189 for Fickling and $3,555 for Burger King.

I.

Arnold argues on appeal that the district court's award of attorneys' fees to Fickling and Burger King was inappropriate under Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). He contends that Christiansburg and its progeny authorize attorney's fees awards to prevailing defendants in Title VII cases only when the record is completely devoid of any evidence of race discrimination or when the suit stems from bad faith or vexatious motive.

The Supreme Court made it clear in Christiansburg that "a district court may in its discretion award attorneys' fees to

a prevailing defendant in a Title VII case, upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation."[3] 434 U.S. at 421. The Christiansburg Court, however, made no attempt to quantify the evidence an unsuccessful plaintiff must produce to avoid an award of attorneys' fees to the defendant. There was no occasion for such formalistic line-drawing. The fixing of attorneys' fees is peculiarly within the province of the trial judge, who is on the scene and able to assess the oftentimes minute considerations which weigh in the initiation of a legal action. The Supreme Court perceived this and, in

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[3]In Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) the Court was interpreting section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) (1976), which provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party. . . . a reasonable attorney's fee. . . ."

Christiansburg, provided only general guidelines for the exercise of this discretion. These guidelines, although generally pointing to considerations similar to those which control substantive decision-making in Title VII cases, emphasize the potential chilling effect fee awards may have on plaintiffs. The Supreme Court, for example, identified the fee award as a conservative tool, to be used sparingly in those cases which the plaintiff presses a claim which he knew or should have known was goundless, frivolous or unreasonable. Id. at 421. It directed the district court to be particularly sensitive to the broad remedial purposes of Title VII and the danger that attorneys' fee awards in favor of defendants can discourage "all but the most airtight cliams." Id. at 422. Finally, it cautioned against post hoc reasoning which presumes the merits of the

claim to attorneys' fees from the outcome of the case. Id. The Supreme Court, however, left the underlying determination of frivolousness largely to the district court's normal decision-making process. The only guidance clothed with some specificity was the Court's direction that the district court need not find "subjective bad faith" to label a claim frivolous. Id. at 421.

"Bad faith", in this context, refers to plaintiffs whose motivation for bringing groundless suits is to accomplish collateral purposes, such as delay or harassment. Such "bad faith" was recognized at common law as justifying an award of attorneys' fees to defendants even in the absence of any congressional purpose such as Congress exhibited in enacting section 706(k) of Title VII. See, e.g., Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).

The Christiansburg Court makes it plain, however, that common law "bad faith" is not necessary to sustain an award of attorneys' fees in Title VII cases. The plaintiff's motive for bringing an action is not central to determining frivolousness for the purposes of awarding attorneys' fees. A plaintiff acting in good faith may nevertheless be assessed fees if his claim is goundless or frivolous. However, although the motivation factor is not a prerequisite to the award of attorneys' fees to the defendant, it may shed light on the degree of frivolousness. Christiansburg, 434 U.S. at 421.

Christiansburg pointed to the basic congressional rationale of Title VII as a guide that lower courts could follow in distinguishing frivolous discrimination claims from ones having merit. In reacting to Christiansburg, however, the

courts have established no consistent pattern in declaring a claim frivolous. Compare, e.g., EEOC v. Fruehauf Corp., 609 F.2d 434 (10th Cir. 1979), cert. denied, 446 U.S. 965 (1980) with Prate v. Freedman 583 F.2d 42, 47-8 (2d Cir. 1978) and Nash v. Reedel, 86 F.R.D. 16, 18 (E.D. Pa. 1980). The case law, to the contrary, reflects that widely divergent factors have affected the finding of frivolousness and the award of attorneys' fees. See National Organization for Women v. Bank of California, 680 F.2d 1291 (9th Cir. 1982) (filing duplicitous motions warrants fee award); Durrett v. Jenkins Brickyard, Inc. 678 F2d 911 (11th Cir. 1982) (knowingly joining wrong defendant justifies fees); Bugg v. International Union of Allied Indus. Workers of America Local 507, AFL-CIO, 674 F2d 595 (7th Cir. 1982) (continuing to prosecute in the face of numerous indicators of meritless claim

justifies award); Montgomery v. Yellow Freight System, Inc., 671 F2d 412 (10th Cir. 1982) (past evidence of racial slurs and disparate treatment are sufficient grounds to show case not groundless or frivolous); Obin v. Dist No.9 of International Ass'n of Machinists and Aerospace Workers, 651 F2d 574 (8th Cir. 1981) (religious slurs, combined with recurring encounters with the same supervisor, showed claim not groundless); Anthony v. Marion County General Hospital, 617 F2d 1164 (5th Cir. 1980) (failure to vigorously prosecute not sufficient ground to award fees); Silver v. KCA, Inc., 586 F2d 138 (9th Cir. 1978) (appellant's subjective good faith belief as to the merits of her claim key factor in disallowing fees). The one common strand running through all these cases is that assessment of frivolousness and attorneys' fees are best left to the sound discretion

of the trial court after a thorough evaluation of the record and appropriate factfinding. See Hensley V. Eckerhart, 76 L. Ed. 2d 40, 53 (1983); see also, Smith v. Josten's American Yearbook, 624 F.2d 125 (10th Cir. 1980); Allen v. Burke, 690 F.2d 376, 379 (4th Cir. 1982), cert. granted, 103 S. Ct. 1873 (1983).

The trial court in the case sub judice clearly was cognizant of the important considerations identified in Christiansburg. Moreover, its findings regarding the frivolousness of Arnold's claim are not only supported but compelled by the evidence. The record demonstrates that Arnold's discharge was precipitated solely by his persistent harassment of female employees. Three female employees not only testified as to the gravity of these incidents of harassment, but also made it clear that they reported the misconduct to supervisory personnel. The

evidence demonstrates likewise that the work environment in Fickling's restaurants was devoid of discrimination which might otherwise give independent credence to Arnold's claim. The work force was approximately 50% white and 50% black. The number of blacks in management positions had risen from one to five in the two-year period in which Arnold was employed. Significantly, a white employee involved in less severe incidents of sexual harassment than Arnold had been discharged earlier--a fact known to Arnold. There was nothing to suggest that the employer's past dealings with Arnold had been anything but aboveboard and free of racial animus. The record, in fact, is devoid of any credible evidence to support Arnold's claim that he was discharged for racial reasons, and the trial court's finding of frivolousness was fully justified.

II.

Arnold argues, however, that even if the claim of discrimination was frivolous, the awards of attorneys' fees in the amount of $7,183 to Fickling and $3,555 to Burger King were excessive.

This court has reiterated that the amount of an attorneys' fee award "'is within the judicial discretion of the trial judge who has close and intimate knowledge of the efforts expended and the value of the services rendered. And an appellate court is not warranted in overturning the trial court's judgment unless under all the facts and circumstances it is clearly wrong.'" Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (4th Cir. 1978) (quoting United States v. Anglin & Stevenson, 145 F.2d 622, 630 (10th Cir. 1944), cert. denied, 324 U.S. 844 (1945). See also Allen v. Burke, 690 F.2d 376, 379 (4th Cir. 1982). We have

identified the twelve factors first enunciated in Johnson v. Georgia Highway Express, Inc., 448 F.2d 714 (5th Cir. 1974)[4] as having a bearing on the appropriate attorneys' fee awards for

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[4]The twelve factors the courts have traditionally considered in awarding plaintiff's fees are:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expections at the onset of litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Allen v. Burke, 690 F.2d 376, 379 (4th Cir. 1982) (quoting Barber v. Kimbrell's Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978). The district court is not required to engage in a lengthy discussion

prevailing plaintiffs. Barber v. Kimbrell's, Inc., 577 F.2d at 226 n.28; see also Anderson v. Morris, 658 F.2d 246, 248-49 (4th Cir. 1981). The starting point for determining the appropriate amount of the award is found by multiplying the number of hours reasonably expended on the case by the reasonable or customary hourly rate. Allen v. Burke, 690 F.2d at 380; Anderson, 658 F.2d at 249. Once this figure is established, the district court is in a position to adjust the award upward or downward in light of the relevant considerations identified in Johnson and elsewhere.

Footnote 4 continued:
concerning what portion of the award is attributable to each factor. In fact, as the United States Supreme Court noted in Hensley v. Eckerhart, __U.S.__, 65 L. Ed. 2d 40 (1983), many of the Johnson factors "are subsumed within the initial calculation of hours reasonably expended at a resonably hourly rate" and need not be further considered at all. Id. at 4555 n.9; see also Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1981).

The same method of calculation has received approval for use in determining the amount of a prevailing defendant's award of attorneys' fees. See, e.g., Tonti v. Petropoulous, 656 F.2d 212 (6th Cir. 1981); Jones v. Dealers Tractor and Equipment Co., 634 F.2d 180 (5th Cir. 1981). This method is not the exclusive means to determine attorneys' fees, nor are the Johnson factors exhaustive of the considerations[5] which should guide courts

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[5]Some Johnson factors obviously have limited transferability as part of a formula for computing attorneys' fees for prevailing defendants. Factor number (8), for example, deals with the worth of the case and the attorney's success or failure in realizing that worth for his client. Definitionally, a frivolous case is devoid of merit or brought for reasons collateral to the purposed of Title VII; hence, the defense attorneys' efforts at exposing its lack of work do not deserve the same assignment of value as the plaintiff's attorney's efforts at unearthing discriminatory practices. In the former instance, the proof is obvious to reasonably skilled counsel. In the latter instance, the proof is often lurking below the surface and requires a great deal of excavation. Factors (3) and (4) are

in assessing fees against plaintiffs. In appropriate circumstances, the district court should give weight to the relative financial positions of the litignts. See, e.g., Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911 (11th Cir. 1982); Faraci v. Hickey-Freeman Co., Inc., 607 F.2d 1025 (2nd Cir. 1979); Spence v. Eastern Airlines, Inc., 547 F. Supp. 204 (S.D. N.Y. 1982); Hill v. Basf Wyandotte Corp., 547 F. Supp. 348 (E.D. Mich. 1982); Sek v. Bethehem Steel Corp., 463 F. Supp. 144 (E.D. Pa. 1979). The policy of deterring frivolous suits[6] is not served by forcing

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Footnote 5 continued.
subject to similar reservations. Factor (10) likewise has limited relevance in prevailing defendant's cases. It is intended to reward an attorney who champions the cause of racial equality in a hostile environment. The defendant's case, by contrast, rarely encounters public enmity of sufficient magnitude to discourage counsel from assuming responsibility for the employer's defense.

[6]The supreme Court acknowledged in Christiansburg Garmet Co. v. EEOC, 434 U. S. 412, 420, 54 L. Ed. 2d 648, 656 (1978),

the misguided Title VII plaintiff into financial ruin simply because he prosecuted a groundless case. Faraci, 607 F.2d at 1028. Indeed, fee awards that callously disregard the financial straits of a losing plaintiff would soon defeat the overarching remedial purposes of Title VII would soon defeat the overarching remedial purposes of Title VII by discouraging all but the airtight cases. Christiansburg, 434 U.S. at 422. The dual interests of equity and deterrence can be advanced without giving overriding consideration to the punitive value of a fee award, particularly when the reduced

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Footnote 6 continued.
that Congress, by the enactment of §706(k) of the Civil Rights Act of 1964, "wanted to protect defendants from burdensome litigation having no legal or factual basis." It identified this purpose as having roughly the same importance as the congressional goal of encouraging plaintiffs to challenge invidious employment practices. Id. see also Grubbs v. Butz, 548 F.2d 973, 975 (D.C. Cir. 1976).

award still represents a substantial burden on the plaintiff and the defendant is fully capable of absorbing a reasonable share of its legal fees without hardship.[7] When the plaintiff can afford to pay, however, the congressional goal of discouraging firvolous suits weighs heavily in favor of levying the full fees. Faraci, 607 F.2d at 1028. Again, the financial position of the plaintiff is but one among the several other relevant factors which a trial judge should

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[7]There are, of course varying degrees of frivolousness, and the trial court's decision to reduce fees when the plaintiff is impecunious should take note of that fact. The Supreme Court noted in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 54 L. Ed. 2d 648 (1978), that "if a plantiff is found to have brought or continued such claim in [subjective] bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." 434 U.S. at 422. It follows from this language that a trial court must be sensitive to the degree of frivolousness involved in a Title VII suit when it decides the appropriate fee award.

consider. A fee award must be based on the reasonable value of the work actually performed on the case; but beyong that limitation, the trial court has broad discretion to reduce the fee award in light of mitigating factors, such as the difficulty of the case, the motivation of the plantiff, and the relative economic status of the litigants.[8]

The trial court, in the instant case, arrived at the amount it awarded by multiplying the number of hours spent on each party's defense by a reasonable hourly attorney's fee. Arnold argues that the court should have considered the relative financial status of the litigants and reduced the fee awards from the amount determined by the pure application of the

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[8]There are, of course, factors which the trial court should not consider in awarding attorneys' fees to the defendant. See, e.g., Anderson v. Morris, 658 F.2d at 249.

timerate formula.

We find no abuse of discretion in the court's decision to award full fees. Arnold's claim of race discrimination was frivolous from the outset, and his insistent prosecution of the claim tested the borders of subjective bad faith.[9] The trial court found that Arnold was gainfully employed and apparently able to pay the fee award on such reasonable terms as might be arranged, and that the fee award was the reasonable value of the attorneys' services. It was required to do no more. Anderson v. Morris, 658 F.2d at 249.

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[9]The trial court expressed the view in its decision that Arnold brought this suit solely to vindicate himself in the eyes of his wife and family, and that he was aware the suit was groundless from its initiation. We need not decide whether this constituted 'subjective bad faith' because the trial court did not make specific findings of fact to support its view of Arnold's motivation

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1697

Filed
Feb. 28, 1984
U.S. Court of Appeals
Fourth Circuit

James D. Arnold, Jr.,

Appellant,

versus

Burger King Corporation and
Fickling Enterprises, Appellees.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judge

Phillips, Judge Sprouse, and Judge Ervin.

For the Court,

/s/ William K. Slate, II

CLERK

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

Civil Action File No. 80-65-CIV-3

JAMES D. ARNOLD, JR.

v. Judgment

FICKLING ENTERPRISES

This action came on for trial before the Court, Honorable W. Earl Britt, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged in open Court:

1. Plaintiff have and recover nothing of defendant.

2. That this action be dismissed with prejudice.

3. Plaintiff pay defendant reasonable attorney fees, said amount to be determined by the Court. Counsel for the defendant is to file with the Court within one (1) week from date of Judgment an Affidavit showing time and expenses incurred in defense of this action.

Memorandum of Law and Opinion, Findings of Fact and Conclusions of Law stated in open Court.

Dated at Fayetteville, North Carolina, this 9th day of July, 1981.

J. RICH LEONARD
Clerk of Court

BY: _____
Deputy Clerk

cc: Willie Swann
125 Gillespie St.
Fayetteville, NC 28301

James Poe
P.O. Drawer 376
Durham, NC 27702

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

Civil Action No.
80-65-CIV-3

JAMES D. ARNOLD, JR.,
Plaintiff

vs.

BURGER KING CORPORATION and
FICKLING ENTERPRISES,
Defendants

APPLICATION FOR AWARD OF ATTORNEY'S FEES AND COSTS

The attorneys for the Defendant hereby make application for an award of attorneys' fees and costs, and in support of the Application, show the following:

1. This is an action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sect. 2000e-2(a)(1) alleging discrimination against the Pliantiff in the terms, conditions and privileges of his employment because of his race.

2. This action has been successfully

defended by the Defendant, FICKLING ENTERPRISES, and Defendant has completely prevailed against Plaintiff in establishing that Plaintiff was discharged for a non-discriminatory reason.

3. Defendants' attorneys are entitled to recovery of attorneys' fees pursuant to 42 U.S.C. Sect. 2000e-5(k).

4. Attached is an Affidavit of the Defendants' attorneys in support of this Application.

WHEREFORE, application is made to the Court to determine and award attorneys fees as follows:

AMOUNT	SERVICES RENDERED
$7,189.00	Fees for time spent by the attorneys for Defendant in litigating this matter, 110.6 hours at $65.00 per hour (see attached Timesheet).
$ 642.80	Expenses for witness fees and costs of depositions.
$7, 831.80	TOTAL AMOUNT REQUESTED

Respectfully submitted, this the 14th day of July 1981.

STUBBS, COLE, BREEDLOVE, PRENTIS & POE

By: _____

G. Jona Poe, Jr.
Attorneys for Defendant
Fickling Enterprises
122 East Parrish Street
Post Office Box 376
Durham, North Carolina 27702
Telephone: (919) 682-9331

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 80-65-CIV-3

JAMES D. ARNOLD, JR.,	)	
	)	
Plaintiff,	)	
	)	
	)	O R D E R
	)	
v.	)	
	)	
BURGER KING CORPORATION and FICKLING ENTERPRISES,	)	
	)	
	)	
Defendants.	)	

The Court having heretofore determined that the institution and prosecution of this action by plaintiff was frivolous and meritless and having determined, in its discretion, that counsel for defendant, Fickling Enterprises, are entitled to recovery of attorneys' fees pursuant to 42 U.S.C. §2000e-5(k) and having directed said counsel to provide the Court with an affidavit of time and costs involved in this action; and said affidavit having

been filed on 15 July 1981; and the Court having reviewed said affidavit and the accompanying application filed therewith finds as a fact that the fees and costs set forth therein are reasonable under the circumstances.

It is, thereupon, in the discretion of the court ORDERED, ADJUDGED and DECREED that defendant, Fickling Enterprises, have and recover of plaintiff, James D. Arnold, Jr., the sum of $7,831.80 as reimbursement for attorney's fees and costs reasonably expended in the defense of this meritless claim.

SO ORDERED.

THIS 16 July 1981.

W. EARL BRITT
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

JAMES D. ARNOLD, JR.,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 80-65-CIV-3
	)	
v.	)	
	)	
BURGER KING CORPORATION and FICKLING ENTERPRISES	)	

Defendants.

MOTION AND APPLICATION FOR ATTORNEY'S FEES BY DEFENDANT BURGER KING CORPORATION

On April 30, 1981, this Court entered summary judgment in favor of the defendant Burger King Corporation in this action. Subsequently, this case was tried and judgment has been entered against the plaintiff and in favor of defendant Fickling Enterprises. Further, the Court has found that the prevailing defendant is entitled to costs, including attorney's fees, under the applicable standard set down in Christianburg Garment Co. v. EEOC,

434 U.S. 410 (1978).

The Complaint in this action contained no separate allegations of discriminatory conduct on the part of defendant Burger King Corporation; liability against defendant Burger King Corporation was alleged solely on the existence of the franchise relationship. Accordingly, if this action was frivilous as to the defendant franchisee Fickling Enterprises, it was also frivilous as to the franchisor, Burger King Croporation. In addition, for the reasons stated in the Memorandum and Recommendation of the United States Magistrate filed in this action on March 11, 1981, Burger King Corporation was found to be entitled to summary judgment.

For the foregoing reasons, the defendant Burger King Corporation now moves for an award of its costs, including attorney's fees, incurred in the defense

of this action, as are shown more specifically in the affidavit attached hereto.

Respectfully submitted this the 16th day of July, 1981.

William P. H. Cary
Attorney for Defendant
Burger King Corporation

OF COUNSEL:

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD
Post Office Drawer U
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Telephone: (919) 373-8850

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 80-65-CIV-3

JAMES D. ARNOLD, JR.,	)	
	)	
Plaintiff,	)	
	)	
	)	O R D E R
	)	
v.	)	
	)	
BURGER KING CORPORATION and FICKLING ENTERPRISES,	)	
	)	
	)	
Defendants.	)	

Defendant, Burger King Corporation, having been dismissed from this action by motion for summary judgment on 30 April 1981 and the Court having heard the cause as to the defendant, Fickling Enterprises, and having determined that the institution and prosecution of the action by the plaintiff was frivolous and meritless, and having heretofore entered an order awarding attorneys' fees to counsel for defendant, Fickling Enterprises; and it

appearing to the Court that counsel for defendant, Burger King Corporation, are likewise entitled to reasonable attorneys' fees pursuant to 42 U.S.C. §2000e-5(k); and counsel for defendant, Burger King Corporation, having submitted to the Court an affidavit indicating 79 hours of time involved which the Court finds reasonable under the circumstances.

It is, thereupon, in the discretion of the Court, ORDERED, ADJUDGED and DECREED that defendant, Burger King Corporation, have and recover of plaintiff, James D. Arnold, Jr., the sum of $3,555.00 as reimbursement for attorneys' fees expended in the defense of this meritless claim.

SO ORDREED.

This 17 July 1981.

W. EARL BRITT
United States District Judge

Office-Supreme Court, U.S.
FILED
JUN 22 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1937

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES A. ARNOLD, JR.,

Petitioner,

vs.

BURGER KING CORPORATION
and
FICKLING ENTERPRISES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS BURGER KING CORPORATION AND FICKLING ENTERPRISES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the District Court abuse its discretion under Christiansburg Garment Co. v. EEOC in awarding the prevailing defendants in a Title VII action reasonable attorneys' fees?

2. Did the District Court abuse its discretion under Christiansburg in fixing the amount of attorneys' fees awarded to the prevailing defendants in a Title VII action?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

No. 83-1937

JAMES D. ARNOLD, JR.,

Petitioner

v.

BURGER KING CORPORATION, and
FICKLING ENTERPRISES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Burger King Corporation and Fickling Enterprises oppose the Petition for Writ of Certiorari seeking to review the decision of the United States Court of Appeals for the Fourth Circuit entered in this case on October 5, 1983.

STATEMENT OF THE CASE

Respondents refer the Court to the summary of facts and proceedings below contained in the opinion of the Fourth Circuit Court of Appeals in this action, reprinted in the Appendix to the Petition, A.2-6. When this case reached the Court of Appeals, Petitioner was unrepresented and arguments on the merits of the district court's findings were submitted on informal briefs. Rule 7(d), Rules of the United States Court of Appeals for the Fourth Circuit. Thereafter, Professor Pollitt agreed to represent the Petitioner and, at the Court's specific request, the parties submitted briefs and oral arguments on the issues of: what standard should be applied in determining whether a case is frivolous under Christiansburg

Garment Co. v. EEOC, 434 U.S. 412 (1978); and, what standard should be applied in determining the amount of fees to be awarded? After the decision of the Fourth Circuit, Petitioner sought a rehearing and suggested a rehearing en banc. Both were denied on February 28, 1984.

ARGUMENT

THE TRIAL COURT'S DETERMINATIONS OF THE APPROPRIATENESS AND AMOUNT OF AN AWARD OF ATTORNEYS' FEES DO NOT PRESENT ANY SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

As this Court held in Christiansburg, supra, the determination that a case is frivolous, unreasonable or without foundation is a matter within

the sound discretion of the district court.[1] Such a determination is based on issues which are solely factual and therefore not usually appropriate for review via a writ of certiorari. National Labor Relations Board v. Waterman S. S. Corp., 309 U.S. 206 (1940); General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938). This Court has frequently recognized that an award of costs is not an appropriate matter for appellate review.

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[1]If the writ is granted, respondents will seek affirmance in the alternative on the ground that the dual, Christiansburg standard is inapplicable where, as here, the defendants were acting in furtherance of the strong public policies prohibiting discrimination, (in this case, sexual harassment).

> The court below should have considerable latitude of discretion on the subject [of awarding costs, including counsel fees], since it has far better means of knowing what is just and reasonable than an appellate court can have.

Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527, 537 (1882).

Since these issues are purely factual, Petitioner's assertion that decisions from other circuits are in conflict with the standards used by the Fourth Circuit is not well founded.

> Nor will differences between two circuits likely be accepted as a sufficient conflict 'if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved.'

13 Moore's Federal Practice ¶817.21, p. SC17-22, citing Harlan, "Manning The Dikes" 13 Record NYCBA 541, 552 (1958).

In a recent article, Judge Friendly

examines in detail the problem of appellate review of acts of trial court discretion. Friendly, Indiscretion about Discretion, 31 Emory L.J. 760 (1982). He concludes that there are many types of discretion and that they should not all be subject to the same standard of review.

> In those situations 'where the decision depends on first-hand observation or direct contact with the litigation,' the trial court's decision 'merits a high degree of insulation from appellate revision.' [citation omitted]

Id. at 783.

The policy reason for this "high degree of insulation" is stated as follows:

> Another principle supporting deference to rulings of the trial court is the absence of the benefits that ordinarily flow from appellate review in establishing rules

> that will govern future cases. This is true in the frequent situations described by Judge Stevens, as he then was, where the factors 'are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result.' [citations omitted].

Id. at 760.

Because of the myriad factors involved in determining whether or not a case is frivolous, a decision in this case will be of little prospective value. As the Court of Appeals in this case concluded after consideration of numerous cases, treatises and law review articles cited to it by the parties:

> The one common strand running through all these cases is that assessment of frivolousness and attorneys' fees are best left to the sound discretion of the

> trial court after a thorough evaluation of the record and appropriate factfinding. [citations omitted].

A.12-13.

CONCLUSION

> Vacating a fee award such as this and remanding for further explanation can serve only as an invitation to losing [parties] to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees .... Where, as here, a district court has awarded a fee that comes within the range of possible fees that the facts, history, and results of the case permit, the appellate court has a duty to affirm the award promptly.

Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed.2d 40, 56 (1983) (Brennan, J., concurring in part and dissenting in part). Accordingly, the petition should be denied.

Respectfully submitted,

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Respondent Burger King
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DATE: June 22, 1984